No. 03-388

In the Supreme Court of the United States

DENNIS BATES, ET AL., PETITIONERS

v.

DOW AGROSCIENCES LLC

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136 *et seq.*, preempts petitioners' state tort claims alleging that application of respondent's herbicide damaged petitioners' peanut crops.

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INTEREST OF THE UNITED STATES

The United States, through the Environmental Protection Agency (EPA), has responsibility for implementing and enforcing the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.* FIFRA generally requires that EPA must register a pesticide and approve its label before that pesticide may be distributed, sold, or used in any State. 7 U.S.C. 136a. States retain power to restrict the distribution, sale, or use of pesticides within their borders, but they cannot "impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C. 136v(b). The United States, which filed a brief amicus curiae at the Court's invitation in response to the petition for a writ of certiorari, has a strong interest in preserving Congress's express delineation of federal and state authority, which ensures that the federal government can establish and maintain nationally uniform requirements for labeling and packaging.

STATEMENT

A. The Federal Insecticide, Fungicide, And Rodenticide Act

1. Congress created FIFRA through a series of enactments to regulate the labeling, sale, and use of pesticides, including herbicides. See *Wisconsin Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 601 (1991). As originally enacted in 1947, see ch. 125, 61 Stat. 163, FIFRA "was primarily a licensing and labeling statute." *Mortier*, 501 U.S. at 601 (quoting *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 991 (1984)). In 1972, Congress "significantly strengthened FIFRA's registration and labeling standards" in response to "environmental and safety concerns." *Ibid.* See Federal Environmental Pesticide Control Act of 1972 (1972 Amendments), Pub. L. No. 92-516, 86 Stat. 973. In addition, Congress amended FIFRA to "regulate the use, as well as the sale and labeling, of pesticides," 501 U.S. at 601 (quoting *Ruckelshaus*, 467 U.S. at 991-992), and granted EPA (which, beginning in 1970, had been charged with federal oversight of pesticide programs) "increased enforcement authority." *Ibid.* The 1972 Amendments effectively "transformed FIFRA from a labeling law into a comprehensive regulatory statute." *Ibid.* (quoting *Ruckelshaus*, 467 U.S. at 991). Congress has continued to amend FIFRA in response to experience gained in regulating pesticides. See, *e.g.*, Federal Pesticide Act of 1978 (1978 Amendments), Pub. L. No. 95-396, 92 Stat. 819; Food Quality Protection Act of 1996 (1996 Amendments), Pub. L. No. 104-170, Tit. II, 110 Stat. 1493.

2. The 1972 Amendments revamped Section 136a of FIFRA and established a detailed program for EPA to register pesticides for particular uses and to approve the associated pesticide labels. 7 U.S.C. 136a. Section 136a(c)(5) of FIFRA provides that EPA "shall register a pesticide" if

the agency determines, in light of any restrictions placed on the pesticide's use, that:

> (A) its composition is such as to warrant the proposed claims for it;
>
> (B) its labeling and other material required to be submitted comply with the requirements of this subchapter;
>
> (C) it will perform its intended function without unreasonable adverse effects on the environment; and
>
> (D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

7 U.S.C. 136a(c)(5). EPA has promulgated regulations implementing FIFRA's requirements. See 40 C.F.R. 152 *et seq.* If a pesticide manufacturer fails to comply with the registration requirements, EPA may issue "stop sale, use, or removal" orders, 7 U.S.C. 136k(a), the offending products may be seized and condemned, 7 U.S.C. 136k(b), and the pesticide manufacturer may be subject to civil and criminal penalties, 7 U.S.C. 136*l*. See 7 U.S.C. 136j (identifying "[u]nlawful acts").

3. EPA interpreted FIFRA's direction that EPA consider whether the pesticide's "composition is such as to warrant the proposed claims for it" (7 U.S.C. 136a(c)(5)(A)) to require EPA to evaluate the "efficacy" of the pesticide. Based on its experience following the 1972 Amendments, EPA reported to Congress in 1977 that the agency's obligation under Section 136a(c)(5) to evaluate efficacy claims in the registration process was diverting scarce resources needed to evaluate environmental and health effects. Congress responded in the 1978 Amendments, providing:

> In considering an application for the registration of a pesticide, the Administrator [of EPA] may waive data requirements pertaining to efficacy, in which event the Administrator may register the pesticide without determining that the pesticide's composition is such as to warrant proposed claims of efficacy.

§ 5, 92 Stat. 825 (7 U.S.C. 136a(c)(5)). As a consequence of the 1978 Amendments, EPA "has waived all requirements to submit efficacy data" for pesticide products except those aimed at controlling certain "pest microorganisms that pose a threat to human health." 40 C.F.R. 158.640(b)(1). EPA's regulations make clear, however, that "each registrant must ensure through testing that his products are efficacious when used in accordance with label directions and commonly accepted pest control practices." *Ibid.* Moreover, EPA "reserves the right to require, on a case-by-case basis, submission of efficacy data for any pesticide product registered or proposed for registration." *Ibid.* See 40 C.F.R. 158.540; 47 Fed. Reg. 53,192 (1982); 44 Fed. Reg. 27,932, 27,938 (1979) (col. 3). In addition to the requirement that applicants for registration develop and maintain efficacy data, EPA requires the registrant, after a pesticide has been registered, to report certain incidents of harm to non-target organisms, such as crops. 40 C.F.R. 159.184.

4. FIFRA's regulatory program encourages federal-state cooperation in regulating pesticides. See *Mortier*, 501 U.S. at 601-602. Section 136v, captioned "Authority of States," sets out key principles of that relationship. See 7 U.S.C. 136v. Section 136v(a) recognizes that, as a general matter, States retain their historic authority to regulate pesticide sale or use, provided that a State does not permit a

sale or use that FIFRA, or EPA's implementing regulations, prohibit:

> **(a) In general**
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

7 U.S.C. 136v(a). Nevertheless, to ensure a uniform nationwide approach to pesticide labeling, Section 136v(b) provides a specific limitation on a State's authority with respect to the content of pesticide labeling:

> **(b) Uniformity**
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. 136v(b). Section 136v(c)(1) further provides that a State shall have the power, subject to various limitations, to allow additional uses of federally registered pesticides within the individual State's borders:

> **(c) Additional uses**
>
> (1) A State may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that State to meet special local needs in accord with the purposes of this subchapter and if registration for such use has not previously been denied, disapproved, or cancelled by the Administrator.

7 U.S.C. 136v(c)(1). Section 136v(c)(2) through (4) sets out additional limitations on state-issued registrations. 7 U.S.C. 136v(c)(2)-(4).

In short, Section 136v provides that a State may prohibit the sale or use of any pesticide within its borders. Under

specified conditions, a State may also allow a pesticide to be used within its borders for purposes other than those provided in the federal registration. A State may not, however, "impose * * * any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C. 136v(b).

B. The Facts And Proceedings Below

1. Petitioners are twenty-nine Texas peanut farmers who claim that respondent Dow Agrosciences LLC's Strongarm herbicide harmed their crops. Pet. App. 1a-2a. They sent respondent letters in accordance with the Texas Deceptive Trade Practices Act (DTPA), Tex. Bus. & Com. Code Ann. § 17.505(a) (West 2002), which provides that plaintiffs seeking judicial relief under the DTPA must give the defendant sixty days' notice before bringing suit. In their notice letters, petitioners stated that, unless respondent provided compensation, petitioners would bring suit for false advertising, breach of warranty, and fraudulent trade practices under the DTPA. Pet. App. 3a.

Before the notice period elapsed, respondent filed suit against petitioners in the United States District Court for the Northern District of Texas. Alleging diversity jurisdiction, respondent sought a declaratory judgment that: (1) FIFRA preempts all of petitioners' state law claims; (2) a paragraph on the Strongarm label, entitled "Limitation of Remedies," restricted petitioners' remedies to reimbursement of the purchase price of the Strongarm product; and (3) a paragraph on the Strongarm label, entitled "Warranty Disclaimer," barred petitioners' warranty claims. Petitioners filed counterclaims alleging negligence, breach of implied and express warranties, fraud in the inducement, defective design, estoppel, and waiver. Pet. App. 3a.[1]

[1] Petitioners also filed separate actions in Texas state court against respondent. Those cases were abated by the Texas state court pending resolution of respondent's action in federal district court. Following the court of appeals' decision, there seem to have been some efforts by petitioners or parties associated with them to revive the state court actions. Respondent obtained a federal court injunction barring petitioners and those in privity with them from pursuing the state court actions. *Dow Agrosciences* v. *Bates*, No. Civ. A. 5:01-CV-331-C, 2003 WL 22660741 (N.D. Tex. Oct. 14, 2003). Petitioners have appealed that order to the Fifth Circuit, which has stayed all proceedings pending this Court's decision in this case. *Dow Agrosciences* v. *Bates*, No. 03-11205 (July 13, 2004).

2. The district court granted summary judgment for respondent. Pet. App. 21a-31a. The court ruled that Section 136v(b) of FIFRA preempted petitioners' negligence and warranty claims because those claims, at bottom, challenged the statements that respondent placed on the Strongarm label. *Id.* at 25a-26a, 30a. The court also held that Section 136v(b) preempted petitioners' fraud claims because those claims were based on alleged statements of respondent's employees and distributors that merely repeated information appearing on the Strongarm label. *Id.* at 27a-28a. Finally, the district court ruled that petitioners' implied warranty claims and claims based on alleged oral statements of respondent's employees and distributors that went beyond the label statements were barred by the express disclaimers that respondent placed on the Strongarm label. *Id.* at 26a-27a, 28a-30a.

3. The court of appeals affirmed. Pet. App. 1a-20a. The court first rejected contentions that the federal courts lacked subject matter jurisdiction because the claims of some of the petitioners did not meet the amount-in-controversy requirement of 28 U.S.C. 1332(a). Pet. App. 3a-5a. The court of appeals next rejected the argument that the district court abused its discretion by not abstaining from exercising jurisdiction in favor of a state court action brought by petitioners. *Id.* at 4a-5a, 8a. Petitioners have not sought further review of those determinations in this Court.

The court of appeals then turned to the question of federal preemption. The court concluded that this case turns on

whether Section 136v(b) of FIFRA, which prohibits States from imposing "any requirements for labeling or packaging in addition to or different from those required under [FIFRA]," 7 U.S.C. 136v(b), expressly preempts petitioners' state law claims. Pet. App. 9a-11a. The court rejected petitioners' arguments that "state labeling requirements related to product effectiveness are not within the scope of FIFRA's express preemption clause" and that the particular claims at issue here are not subject to express preemption because they "are not sufficiently related to the content of the Strongarm label." *Id.* at 11a; see *id.* at 12a-15a, 15a-19a.

a. The court rejected petitioners' contention that FIFRA does not preempt product efficacy claims, as opposed to product safety claims, reasoning that Section 136v(b) expressly preempts "any requirement for labeling" that is "in addition to or different from" what FIFRA requires, without reference to the subject matter of the labeling requirement. Pet. App. 12a-13a. The court noted that "FIFRA's text does not define the scope of FIFRA's preemption clause to be a function of existing EPA regulations." *Id.* at 13a. Rejecting petitioners' reliance on *American Cyanamid Co.* v. *Geye*, 79 S.W.3d 21 (Tex. 2002), cert. denied, 539 U.S. 969 (2003), the court concluded that Section 136v(b) expressly preempts any state court action that would result in imposing a labeling requirement "in addition to or different from" (7 U.S.C. 136v(b)) the requirements imposed through EPA approval of the product label under FIFRA, regardless of the scope of the product evaluation that EPA conducts in the course of approving the label. Pet. App. 14a-15a.

b. The court of appeals analyzed whether Section 136v(b) preempted the specific claims at issue by examining "whether a judgment against [respondent] would cause it to need to alter the Strongarm label." Pet. App. 16a; see *id.* at 15a-19a. The court concluded that Section 136v(b) preempted petitioners' breach-of-warranty and fraud-related claims because those claims were predicated on alleged "off

label" representations that did not differ in "any material manner" from the Strongarm label. *Id.* at 16a-17a. The court reasoned that imposing liability would, as a practical matter, force respondent to alter its label. *Ibid.* The court concluded that Section 136v(b) preempted petitioners' defective design and negligence claims because each was "a disguised claim for failure to warn" that, if successful, would similarly force respondent to change its label. *Id.* at 18a-19a.

SUMMARY OF ARGUMENT

A. FIFRA prohibits States from imposing "any requirements" for pesticide labeling that are "in addition to or different from" those required under FIFRA. 7 U.S.C. 136v(b). The plain terms of that prohibition expressly preempt state pesticide labeling requirements, regardless of whether those requirements are expressed through positive enactments or common-law duties. See *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992). Neither the structure of Section 136v(b), nor the purposes or legislative history of FIFRA, provides a persuasive basis for categorically exempting state common-law requirements from preemption. Rather, Section 136v(b) preempts any state common-law duties that would compel the manufacturer of a pesticide registered under FIFRA to change its EPA-approved label to avoid liability.

B. Section 136v(b) does not exempt from preemption state labeling requirements pertaining to pesticide efficacy. EPA generally does not require an applicant for pesticide registration to submit efficacy data in the course of the FIFRA registration process, but that fact does not alter Section 136v(b)'s preemptive effect. FIFRA continues to impose labeling requirements respecting product efficacy. There accordingly is no basis for distinguishing, for purposes of applying Section 136v(b)'s express preemption provision, label requirements respecting product efficacy from other

label requirements addressing, for example, safety, health, or environmental concerns.

C. Section 136v(b) also does not exempt from preemption common law duties, such as those prohibiting "false or misleading" statements, that are facially "consistent with" FIFRA's misbranding prohibitions. State common-law standards, even if nominally identical to FIFRA's misbranding prohibitions, are applied by judges and juries. The application of those standards in 50 state jurisdictions would invariably result in inconsistent labeling requirements and undermine FIFRA's central goal of promoting uniform labeling requirements.

D. Petitioners did not ask this Court to review the court of appeals' affirmance of the district court's determination that petitioners' particular state-law claims are "label-related," in the sense that petitioners' success on those claims would compel a pesticide manufacturer to change the label on its product in order to avoid future liability. The Court accordingly should not reach those issues, which turn on a case-specific evaluation of the factual allegations and the particular characteristics of the claims for relief.

ARGUMENT

FIFRA PRECLUDES STATE TORT CLAIMS THAT WOULD SUBJECT PESTICIDE MANUFACTURERS TO INCONSISTENT PRODUCT LABELING REQUIREMENTS

A. Section 136v(b) Preempts State Common-Law Duties That Would Impose Requirements For Labeling "In Addition To Or Different From" Those Required Under FIFRA

FIFRA forbids States from imposing "any requirements" for pesticide labeling "in addition to or different from" those required under FIFRA. 7 U.S.C. 136v(b). The statutory term "any requirements" includes both positive state regu-

lation and indirect regulation through state common-law tort actions. As the court of appeals correctly held, therefore, Section 136v(b) preempts state common-law duties that would have the effect of compelling the manufacturer of a pesticide registered under FIFRA to change its EPA-approved label in order to avoid liability.

1. *Section 136v(b) expressly preempts both state regulatory requirements and state common-law duties*

Section 136v(b) broadly and expressly prohibits "any requirements for labeling" that are "in addition to or different from" those that FIFRA imposes. 7 U.S.C. 136v(b). Section 136v(b)'s plain text does not distinguish among state labeling requirements based on their origin in a state legislature's enactment of statutes, a state agency's promulgation of rules, or a state court's articulation of common-law standards of care. All state labeling requirements, regardless of their source, are preempted.

This Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), confirms the plain meaning of Section 136v(b)'s unambiguous prohibition. The Court ruled in *Cipollone* that a provision of the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. 1331 *et seq.*, proscribing the imposition of any tobacco advertising "requirement or prohibition * * * under State law," encompasses not only state statutes and regulations, but also state common-law duties enforced through tort actions. See 505 U.S. at 521-523 (plurality opinion of Stevens, J.); *id.* at 548-549 (Scalia, J., concurring in part). On this issue, "[t]here is no notable difference between the language in the 1969 Cigarette Act and the language in FIFRA." *Taylor AG Indus.* v. *Pure-Gro*, 54 F.3d 555, 559 (9th Cir. 1995). In each instance, the plain terms of a federal statute's express preemption provision precludes state common-law tort actions based on

alleged labeling deficiencies. See Pet. App. 12a & n.11 (citing additional decisions).

This Court's decision in *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996), further fortifies that conclusion. The Court ruled in *Medtronic* that the Food and Drug Administration's (FDA's) approval of a pacemaker under relevant provisions of the Medical Device Amendments of 1976 (MDA), Pub. L. No. 94-295, 90 Stat. 539 (21 U.S.C. 360c *et seq.*), did not, under the particular circumstances presented, preempt a state-law action alleging that the pacemaker was improperly designed. See 518 U.S. at 492-494. The separate *Medtronic* opinions recognized, however, that the MDA's provisions prohibiting the States from establishing any inconsistent "requirement" that "relates to the safety or effectiveness of the device," 21 U.S.C. 360k(a), could preempt state-law damage suits. See 518 U.S. at 504 (Breyer, J., concurring in part); *id.* at 509-512 (O'Connor, J., concurring in part and dissenting in part); see also *id.* at 502 (opinion of Stevens, J.).

This Court has correctly recognized that Congress could not have intended the anomalous consequences that would result if federal statutes that preempt inconsistent state "requirements" were construed to reach state agency regulations but exclude state common-law duties. As Justice Breyer's separate opinion in *Medtronic* explained in comparing regulations and common-law duties that address the same subject matter:

> The effects of the state agency regulation and the state tort suit are identical. To distinguish between them for pre-emption purposes would grant greater power (to set state standards "different from, or in addition to," federal standards) to a single state jury than to state officials acting through state administrative or legislative law-making processes.

518 U.S. at 504. The lower courts have followed this Court's guidance in *Cipollone* and *Medtronic*. They have ruled, with

near unanimity, that Section 136v(b)'s prohibition of state labeling requirements preempts state requirements imposed through common-law duties and precludes state tort actions based on inadequate labeling.[2]

2. *Section 136v(b) does not indirectly exempt state common-law duties from preemption*

Petitioners contend that Section 136v(b) can be construed in a manner that would "not compel" preemption of state common-law duties. Pet. Br. 16-25. Petitioners essentially ask this Court to reject the plain import of clear text in favor of strained inferences that the lower courts have correctly found unpersuasive.

a. Petitioners first note (Pet. Br. 17) that Section 136v(a) preserves state authority to "regulate the sale or use" of

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[2] Nine federal courts of appeals have ruled that FIFRA expressly preempts state-law based claims that challenge a product's label. *Grenier* v. *Vermont Log Bldgs., Inc.*, 96 F.3d 559 (1st Cir. 1996); *Hawkins* v. *Leslie's Pool Mart, Inc.*, 184 F.3d 244 (3d Cir. 1999); *Lowe* v. *Sporicidin Int'l*, 47 F.3d 124 (4th Cir. 1995); *Kuiper* v. *American Cyanamid Co.*, 131 F.3d 656 (7th Cir. 1997), cert. denied, 523 U.S. 1137 (1998); *Netland* v. *Hess & Clark Inc.*, 284 F.3d 895 (8th Cir.), cert. denied, 537 U.S. 949 (2002); *Nathan Kimmel, Inc.* v. *DowElanco*, 275 F.3d 1199 (9th Cir. 2002); *Arkansas-Platte & Gulf P'ship* v. *Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir. 1992), aff'd after remand, 981 F.2d 1177 (10th Cir.), cert. denied, 510 U.S. 813 (1993); *Lowe's Home Ctrs., Inc.* v. *Olin Corp.*, 313 F.3d 1307 (11th Cir. 2002). Only the D.C. Circuit, in *Ferebee* v. *Chevron Chem. Co.*, 736 F.2d. 1529, 1540-1541, cert. denied, 469 U.S. 1062 (1984), has held to the contrary. The D.C. Circuit premised its *Ferebee* decision, which pre-dated *Cipollone*, on the conclusion that "requirements" did not include common-law duties. Although the D.C. Circuit has not revisited its *Ferebee* decision, it embraced *Cipollone*'s reasoning in *Waterview Management Co.* v. *FDIC*, 105 F.3d 696 (D.C. Cir. 1997). Eighteen state supreme courts have held that FIFRA preempts state tort actions. See Resp. Br. in Opp. 16-17 n.15. But see *Sleath* v. *West Mont. Home Health Servs., Inc.*, 16 P.3d 1042, 1051-1053 (Mont. 2000), cert. denied, 534 U.S. 814 (2001) (holding that FIFRA does not preempt state tort actions); *American Cyanamid Co.* v. *Geye*, 79 S.W.3d 21 (Tex. 2002), cert. denied, 539 U.S. 969 (2003) (holding that FIFRA does not preempt state tort actions alleging the product is ineffective).

federally registered pesticides, while Section 136v(b) prohibits state "requirements for labeling or packaging." 7 U.S.C. 136v(a) and (b). Petitioners argue that Section 136v(a) should be viewed as identifying a class of permissible state "regulat[ions]"—supposedly limited to "positive enactments"—while Section 136v(b) should be viewed as prohibiting a "subset" of those positive enactments respecting labeling. Pet. Br. 17-18. Section 136v's text, however, does not support that construction.

Section 136v(a) and Section 136v(b) are independent provisions that contain separate, stand-alone commands. The provisions are linked only insofar as Section 136v(a) provides that "[a] State" may regulate sale and use, while Section 136v(b) provides that "[s]uch State" shall not impose labeling requirements. That syntax indicates that Sections 136v(a) and 136v(b) give direction to the same entities—"States." But it does not suggest that the two provisions address the same set of laws such that, if Section 136v(a) embraces only "positive enactments," then Section 136v(b)'s "requirements" must be a "subset" of those "positive enactments." If Congress had intended the construction that petitioners urge, it would have linked not just the relevant entity (*viz.*, the "State") but the laws as well (*e.g.*, by referring to "regulations" in subsection (a) and "such regulations" in subsection (b)). In fact, Section 136v does not expressly link the laws addressed in subsection (a) and those addressed in subsection (b), and it does not use the precise term "regulations" in either subsection.[3]

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[3] Contrary to petitioners' suggestion (Pet. Br. 18), there is nothing "unnatural" in recognizing that FIFRA's labeling requirements, which are expressed in the form of statutory and regulatory provisions, preempt state requirements, whether expressed in the form of positive enactments or common law duties. "There is, of course, 'no federal general common law.'" *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (quoting *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78 (1938)). Consequently, federal requirements generally take the form of statutes or regulations, while state requirements may arise from positive enactments or common-law duties. Section 136v(b) quite naturally uses the terms "requirements" and "required" to accommodate the full range of federal and state legal obligations, whatever form they might take.

b. Petitioners contend that "it makes no sense" (Pet. Br. 18-19), in light of Section 136v(a)'s preservation of state authority to ban the sale or use of a pesticide, to construe Section 136v(b) to deny the State the "lesser" authority to impose common-law liabilities for alleged labeling deficiencies. Congress's concern in Section 136v(b), however, is national uniformity and certainty in labeling. If a State bans a pesticide manufacturer from selling a particular product within that State's borders, the ban does not interfere with the federal objective of ensuring that pesticide manufacturers are subject to a single body of labeling requirements and can generally use the same label in every State. But if each State could subject a pesticide manufacturer to liability based on common-law duties respecting labeling that are peculiar to that State, then the federal objective of uniformity would be frustrated. Section 136v(b) addresses that problem by prohibiting States from imposing labeling requirements, whether through positive enactment or through the common law.

c. Petitioners also contend (Pet. Br. 19-20) that there is nothing objectionable about allowing a State to employ common-law liabilities to force pesticide manufacturers to revise their labels because a State can employ its reserved powers under Section 136v(a) to achieve the same end.[4] Specifically, petitioners suggest that a State might induce a manufacturer to revise a pesticide label by threatening to

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[4] Petitioners also cite (Pet. Br. 19) the authority that FIFRA grants to States, under Section 136v(c) and associated regulations, to register additional uses of a pesticide. See 7 U.S.C. 136v(c). States that act under Section 136v(c) are essentially standing in EPA's shoes in exercising FIFRA registration authority, however, so it is not surprising that EPA regulations grant States, in that narrow instance, label review authority similar to EPA's authority.

prohibit the sale or use of the product under Section 136v(a). Petitioners err in suggesting that such state action would necessarily be permissible under Section 136v(b), which by its nature limits the authority otherwise preserved for the States by Section 136v(a). Any state "sale or use" regulation that was adopted with the purpose and effect of compelling a pesticide manufacturer to change its EPA-approved label could well be preempted by Section 136v(b), because it could be construed as amounting to a labeling requirement "in addition to or different from" those imposed under FIFRA. Petitioners' contrary reading of FIFRA would permit States to eviscerate the limitations set forth in Section 136v(b) at will by the simple device of restating their label-related requirements as "sale or use" regulations. See *United States* v. *United Cont'l Tuna Corp.*, 425 U.S. 164, 169 (1976) ("[w]e should * * * be * * * hesitant to infer that Congress intended to authorize evasion of a statute at will").

d. Petitioners invoke (Pet. Br. 21-22) the general statement that "Congress does not cavalierly pre-empt state-law causes of action." *Medtronic*, 518 U.S. at 485. But that observation is merely the starting point of the analysis and of little help in interpreting an *express* preemption provision. Congress's intent "'is the ultimate touchstone' in every pre-emption case," *id.* at 485 (quoting *Retail Clerks Int'l Ass'n, Local 1625* v. *Schermerhorn* 375 U.S. 96, 103 (1963)), and "Congress's intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it," *id.* at 486 (quoting *Gade* v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part)). Section 136v(b)'s language—particularly its use of the term "requirements"—is sufficiently clear to establish Congress's intent to preempt common law duties respecting pesticide labeling. See *Cipollone*, 505 U.S. at 522 (opinion of Stevens, J.); *id.* at 548-549 (Scalia, J., concurring in part). See pp. 11-13, *supra*.

e. Petitioners contend that FIFRA employs the term "requirements" outside of Section 136v(b) to refer to "direct commands arising out of statutory or regulatory enactments." Pet. Br. 22. They argue (*id.* at 22-25) that Section 136v(b) should be construed consistently with that usage. But even if petitioners' characterization is accurate, such usage does not demonstrate that Congress intended to limit the term to a subset of its ordinary meaning in Section 136v(b). As this Court has explained, the term "requirements" is naturally understood to embrace both positive enactments and common-law duties, see pp. 11-13, *supra*, and it is therefore unsurprising that it can be used to refer to either or both types of legal rules depending on the context in which it is used. For the reasons already stated, Section 136v(b) employs the term in a context that embraces both positive enactments and common-law duties. See pp. 13-14, *supra*.[5]

Petitioners ignore the reality that, if Congress had intended to preserve state common-law actions challenging the adequacy of pesticide labeling, it would have said so. Congress could have stated that only state laws and regulations

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[5] FIFRA's references to federal "requirements" necessarily identify federal statutory or regulatory provisions because "[t]here is, of course, 'no federal general common law.'" *Texas Indus.*, 451 U.S. at 640 (quoting *Erie R.R.*, 304 U.S. at 78). See Pet. Br. 22-23. Thus, it is hardly probative that FIFRA does not use the term to refer to common-law duties in discussing *federal* requirements—the vast majority of the uses identified by petitioners. The one specific reference to state requirements identified by petitioners involves a provision authorizing States to establish "minimum requirements for training" certain personnel. *Id.* at 24 (citing 7 U.S.C. 136w-5). Such requirements, unsurprisingly, are invariably set out as positive enactments. See Pet. Br. 24. Section 136v(b), by contrast, uses the term "requirements" in the context of preemption, where "[t]he effects of the state agency regulation and the state tort suit are identical." *Medtronic*, 518 U.S. at 504 (Breyer, J., concurring in part). In that context, the term "requirements" naturally encompasses positive enactments and common-law duties. See pp. 12-13, *supra*.

are preempted. See *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 58-59, 63 (2002) (addressing the Federal Boat Safety Act of 1971, 46 U.S.C. 4301 *et seq.*). Or Congress could have enacted a savings clause that expressly disclaimed any intent to preempt tort actions. See *id.* at 59, 63; *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 867-868 (2000) (addressing the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1381 *et seq.* (1988)). Congress did neither. Instead, it employed language that, as this Court has recognized, expresses the intent to preclude state common-law causes of action.

3. *The legislative history of FIFRA does not establish that Congress intended to preserve state common-law duties respecting pesticide labeling*

Petitioners assert that Section 136v(b) should not be construed to preempt state common-law duties respecting pesticide labeling because FIFRA's legislative history does not express that intention. Pet. Br. 25-27. The Court disposed of a similar argument in *Cipollone*, stating:

> Although portions of the legislative history * * * suggest that Congress was primarily concerned with positive enactments by States and localities * * *, the language of the Act plainly reaches beyond such enactments. "We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983).

Cipollone, 505 U.S. at 521-522. The absence of legislative history expressing an intent to preclude tort actions reveals nothing and, in any event, cannot overcome the preemptive force of Section 136v(b)'s plain text. *Ibid.* See, *e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 385 n.2 (1992) ("[L]egislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning."); *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) ("It would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute.").[6]

Even if this Court were to give weight to the legislative history, it would find that it demonstrates no positive intent to preserve tort actions. To the contrary, the Committee reports supporting Congress's 1972 overhaul of FIFRA contain statements expressing an intent to provide for broad preemption of state requirements respecting pesticide labels. The House Committee Report states, with reference to Section 136v(b), that "the Committee has adopted language which is intended to completely preempt State authority in regard to labeling and packaging." H.R. Rep. No. 511, 92d Cong., 1st Sess. 16 (1971). The Senate Committee Report expresses a similar intent, stating "[Section 136v(b)] preempts any State labeling or packaging requirements differing from such requirements under the Act." S. Rep. No. 838, 92d Cong., 2d Sess. Pt. 1, at 30 (1972). Those statements suggest that Congress envisioned that all

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[6] In *Medtronic*, five Justices found that Congress's use of the term "requirements" clearly reached common-law duties. See 518 U.S. at 511 (O'Connor, J., concurring in part) ("If § 360k's language is given its ordinary meaning, it clearly pre-empts any common-law action that would impose a requirement different from, or in addition to, that applicable under the FDCA—just as it would pre-empt a state statute or regulation that had that effect."); *id.* at 503-504 (Breyer, J., concurring in part and concurring in the judgment) ("The statute's language, read literally, supports that conclusion. * * * One can reasonably read the word 'requirement' as including the legal requirement that grow[s] out of the application, in particular circumstances."). There is no reason to believe that resort to legislative history would have altered those views. See *Mortier*, 501 U.S. at 610 n.4 ("No matter how clearly its report purports to do so, a committee of Congress cannot take language that could only cover 'flies' or 'mosquitoes,' and tell the courts that it really covers 'ducks.'").

"requirements"—whatever their form—would be preempted.

4. *The United States has properly reconsidered and disavowed its prior position that Section 136v(b) does not preempt state common-law duties*

As the United States explained in its brief amicus curiae in *American Cyanamid Co.* v. *Geye*, cert. denied, 539 U.S. 969 (2003), on two earlier occasions in the past, the United States filed briefs as amicus curiae in the lower courts arguing that FIFRA does not preempt certain state-law actions and making some of the same arguments that petitioners and their amici curiae present here. See U.S. Amicus Curiae Br., *Hart* v. *Bayer Corp.*, 199 F.3d 239 (5th Cir. 2000) (No. 98-60496); U.S. Amicus Curiae Br., *Etcheverry* v. *TRI-AG Serv., Inc.*, 993 P.2d 366 (Cal. 2000) (No. S072524). The California Supreme Court rejected the United States' submission. *Etcheverry*, 993 P.2d at 369-377.[7] As the United States explained in its *Geye* brief, the United States reexamined its position in light of the California Supreme Court's ruling in that case, as well as the subsequent rulings of other courts, and concluded that its prior position is incorrect. See U.S. Amicus Curiae Br. at 16-19, *American Cyanamid Co.* v. *Geye*, *supra* (No. 02-367). The United States properly reevaluated its position in light of the considerations expressed in this brief.

B. Section 136v(b) Does Not Exempt From Preemption State Labeling Requirements Pertaining To Product Efficacy

Petitioners contend that, even if Section 136v(b)'s reference to "requirements" includes common-law duties, Section 136v(b) does not preempt their state-law claims because

[7] In *Hart*, the court of appeals ruled that the case had been improperly removed from state court and, therefore, did not address whether the plaintiff's claims were preempted. See 199 F.3d at 243.

those claims are predicated on Strongarm's alleged inefficacy rather than safety, health, or environmental concerns. Pet. Br. 30-37. Specifically, petitioners contend that, because "FIFRA no longer imposes a duty on EPA to evaluate the efficacy of any federally registered pesticide," there are no federal requirements relating to efficacy, and the "'requirements' preempted in section 136v(b), therefore, cannot include claims concerning the efficacy of pesticides." *Id.* at 30.

Petitioners are mistaken. To be sure, EPA generally does not require an applicant for registration to submit efficacy data in the course of the FIFRA registration process. As previously noted (pp. 3-4, *supra*), Congress amended FIFRA in 1978, at EPA's request, to give the agency authority to waive the requirement that applicants submit information demonstrating that their products are efficacious. See 7 U.S.C. 136a(c)(5). EPA has generally waived such requirements and typically does not conduct independent product efficacy evaluations. 40 C.F.R. 158.640(b)(1); see EPA Pesticide Registration Notice 96-4 (June 3, 1996) (J.A. 228-235). But neither the 1978 Amendments, nor EPA's waiver of data requirements, alters Section 136v(b)'s preemption of state requirements respecting pesticide labels.[8]

[8] Furthermore, the issue of EPA's involvement or non-involvement in efficacy matters is not as simple as petitioners would suggest. Although EPA generally does not review efficacy data in registering a pesticide, efficacy issues may receive closer scrutiny in numerous circumstances. For example, EPA may examine efficacy data: (1) in making registration decisions for products not covered by the general data waiver (*e.g.* hospital disinfectants) see 40 C.F.R. 158.640(b)(1); (2) for the purpose of making statutory findings regarding reduced-risk pesticides, see 7 U.S.C. 136a(c)(10), the "public interest," see 7 U.S.C. 136a(c)(7)(C), and the FIFRA risk/benefit standard, see 7 U.S.C. 136(bb); and (3) in evaluating information submitted pursuant to the registrant's continuing obligation to report information bearing on a pesticide's unreasonable adverse effects, see 7 U.S.C. 136d(a)(2); 40 C.F.R. 159.184. Predicating tort preemption on EPA's involvement, or lack thereof, in efficacy determinations could undermine EPA's discretionary decision not to review efficacy data in certain circumstances and lead to frequent, burdensome discovery

The 1978 Amendments did not modify the operative terms of Section 136v(b), which prohibit a state from imposing "any requirements" that are "in addition to or different from" the FIFRA requirements. 7 U.S.C. 136v(b).[9] The 1978 Amendments relieved EPA of any obligation to require applicants for registration to submit efficacy data, or for EPA to review such data on its own, but the 1978 Amendments left in place the requirement that applicants submit accurate product efficacy labeling in the registration process. See 7 U.S.C. 136a(c)(5)(B). For example, EPA requires the applicant to provide directions for use that are "adequate to protect the public from fraud," 40 C.F.R. 156.10(i)(1)(i), and that include "[a]ny limitations or restrictions on use required to prevent unreasonable adverse effects, such as * * * [w]arnings as required against use on certain crops," 40 C.F.R. 156.10(i)(2)(x) and (C).[10]

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demands that would be very intrusive in EPA's regulatory decision-making process.

[9] The 1978 Amendments did alter the language of Section 136v(b) in certain respects that are not relevant here. Those Amendments changed the phrase "labeling and packaging" to "labeling or packaging," and changed the phrase "those required pursuant to this subchapter" to "those required under this subchapter." Compare 7 U.S.C. 136v(b) (1976), with 7 U.S.C. 136v(b) (Supp. II 1978).

[10] While EPA generally does not require applicants to submit efficacy data as part of the initial registration process and does not review efficacy claims, EPA continues to require registrants to develop and maintain data supporting their efficacy claims. 40 C.F.R. 158.640(b)(1); see 40 C.F.R. 158.540. Applicants must provide EPA with that data if the agency so requests, *ibid.*, and in some circumstances (including respondents' initial registration of Strongarm, see U.S. Amicus Curiae Br. on Pet. 16 n.5) must submit it with their registration application. See EPA Pesticide Registration Notice 97-3, § VII(G) (Sept. 4, 1997) (J.A. 252). An applicant must also inform EPA (subject to certain exceptions) if it learns that a registered pesticide has harmed non-target organisms, such as crops or persons. 40 C.F.R. 159.184. Accordingly, EPA continues to exercise oversight of registrants' efficacy claims, and registrants remain obligated to revise their label in light of current information.

Notwithstanding the 1978 Amendments, FIFRA still contains labeling requirements respecting product efficacy, and there accordingly is no reason to distinguish, for purposes of preemption, label requirements respecting product efficacy from label requirements respecting safety, health, or environmental concerns. FIFRA and its implementing regulations specify what a label must contain with respect to "product efficacy," and Section 136v(b) correspondingly bars States from imposing "any requirements for labeling"—including those derived from common-law duties—that are "in addition to or different from those required under [FIFRA]." 7 U.S.C. 136v(b).[11]

C. Section 136v(b) Does Not Exempt From Preemption State Common-Law Duties That Are "Consistent With" FIFRA's Misbranding Prohibitions

Petitioners assert (Pet. Br. 37-39) that Section 136v(b) does not preempt common law duties that result in liability for "false or misleading" statements because those duties are "consistent with" FIFRA's misbranding provisions. See 7 U.S.C. 136(q) (defining "misbranding"); see also 7 U.S.C. 136j(a)(1)(E) (proscribing "misbranding"). Petitioners are mistaken. The State's application of a state-law prohibition

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[11] Petitioners note (Pet. Br. 31, 32) EPA's past statements that pesticide producers remain "potentially subject to damage suits by the user community if their products prove ineffective in actual use." 47 Fed. Reg. at 40,661; see also Pesticide Registration Notice 96-4 (June 3, 1996) (J.A. 230). Those statements are consistent with the numerous court decisions that have held that FIFRA does not preclude all state tort actions, but instead preempts only *label-related* common-law suits. See Pet. App. 10a-11a. Petitioners' reliance (Pet. Br. 35-36) on *Medtronic*'s allowance of some types of tort suits (see 518 U.S. at 492-502) is similarly misplaced. The fact that an express preemption provision does not preclude all tort suits does not diminish the provision's preemptive force with respect to those tort suits that fall within its terms. See *Medtronic*, 518 U.S. at 502.

against "false or misleading statements," even if phrased in general terms similar to FIFRA's misbranding prohibition, would result in the imposition of state "requirements for labeling" that are "in addition to or different from those required under [FIFRA]" (7 U.S.C. 136v(b)).[12]

A comparison of the FIFRA misbranding provisions and the analogous common-law duties demonstrates why this is so. When a pesticide manufacturer submits a FIFRA registration application to EPA, the manufacturer must include "a complete copy of the labeling of the pesticide," 7 U.S.C. 136a(c)(1)(C), that "compl[ies] with the requirements of [FIFRA]," 7 U.S.C. 136a(c)(5), including EPA's detailed labeling requirements, 40 C.F.R. Pt. 156. The manufacturer is subject to federal sanctions if EPA later determines that the registered pesticide is "misbranded." See 7 U.S.C. 136j(a)(1)(E). EPA may determine that a pesticide is misbranded if, among other things, the labeling "bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular," does not provide adequate "directions for use," or omits necessary warnings. 7 U.S.C. 136(q)(1)(A), (F) and

[12] Petitioners incorrectly assert (Pet. Br. 38 n.27) that the United States "endorsed [petitioners'] reasoning" in its *Geye* amicus brief. The United States observed that this Court had ruled in *Medtronic* that the MDA "does not bar common law tort claims that are based on a violation of federal regulations." U.S. Amicus Curiae Br. at 13, *American Cyanamid Co.* v. *Geye*, *supra* (No. 02-367). But the United States explicitly took "no position" in *Geye* "with respect to whether, or what extent" FIFRA preempted the particular claims at issue. *Id.* at 19. Moreover, while it may be permissible for a State to subject a pesticide registrant to common-law liability based on *EPA's* determination that a registrant violated a FIFRA labeling requirement, it would not be permissible for a state court to impose an analogous state-law standard that would result in additional or different labeling requirements, or to purport to enforce a federal standard in factual circumstances that had not been addressed by the expert federal agency charged with ensuring a uniform construction and application of the federal standard.

(G). EPA may pursue a variety of sanctions, including federal stop sale orders, seizure and condemnation of the offending product, and imposition of civil or criminal penalties. See 7 U.S.C. 136j-136*l*. The FIFRA provisions, taken in combination, provide a comprehensive scheme for imposing and enforcing a nationally uniform system of labeling requirements and confer upon EPA the full range of authority to interpret and apply the uniform federal standards.

If a State could subject pesticide manufacturers to the additional state common-law duty to avoid "false or misleading" labeling, with the threat of additional consequences for its violation (including imposition of punitive damages, J.A. 192), the application of that standard would impose "requirements for labeling" that are "in addition to or different from those required under [FIFRA]." FIFRA § 24(b), 7 U.S.C. 136v(b). It is no answer to say that the FIFRA misbranding standard and the state standard of due care are "consistent," because the State is under no obligation under state law to ensure that its common-law standard produces labeling requirements that are the same as those mandated under FIFRA—and absent an EPA finding of misbranding is in no position to do so. EPA administers FIFRA through centralized expert judgment, while the 50 States apply common-law standards through an adversarial process in which lay judges and juries can "reach different decisions on similar facts." *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 871 (2000). Consequently, it is virtually certain that even identically phrased federal and state standards would produce divergent labeling requirements. See *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 242-243 (1959). Pesticide manufacturers would be subject to multiple and inconsistent labeling regimes and would be

forced to abandon or alter EPA-approved labels to avoid liability.[13]

Congress, which expressed its objective in Section 136v(b) to subject pesticide manufacturers to a single body of federal law governing pesticide labeling obligations, could not have intended to undermine that uniformity by allowing each State to determine for itself whether the federally approved label is "false or misleading," and, if so, what remedies and sanctions to impose on the registrant. Rather, Congress prohibited States from imposing additional "requirements for labeling" (7 U.S.C. 136v(b)), including those arising from

[13] Contrary to petitioners' suggestion (Pet. Br. 38-39), this Court's decision in *Medtronic* does not support the notion that FIFRA's misbranding provisions and comparable common-law duties respecting "false or misleading statements" can comfortably coexist. As the Court emphasized, preemption principles must be applied with careful attention to the way in which Congress intended the particular "statute and its surrounding regulatory scheme to affect business, consumers, and the law." 518 U.S. at 486. FIFRA and the MDA are dissimilar in key respects. For example, the Court pointed out in *Medtronic* that "pre-emption under the MDA does not arise directly as a result of the enactment of the statute; rather, in most cases a state law will be pre-empted only to the extent that the FDA has promulgated a relevant federal 'requirement.'" *Id.* at 496. See 21 U.S.C. 360k(a) (preempting state requirements that are different from "any requirement applicable under this subchapter to the device"). FDA's regulations themselves stated that the MDA generally "does not preempt a state or local requirement prohibiting the manufacture of adulterated or misbranded devices" unless "such a prohibition has the effect of establishing a substantive requirement *for a specific device*." 518 U.S. at 499 (quoting 21 C.F.R. 808.1(d)(6)(ii)) (emphasis added). The Court in *Medtronic* explained that "our interpretation of the pre-emption statute is substantially informed by these regulations." *Id.* at 495. In the case of FIFRA, by contrast, preemption can arise directly from FIFRA itself and EPA has enacted no comparable regulation. FIFRA's preemption provision does not contain the "specific device" limitation that the Court discerned in the MDA and FDA's implementing regulations. See *Id.* at 498-501. And even if FIFRA contained such a requirement, EPA's approval of a particular pesticide label would satisfy any such specificity requirement. Accordingly, the Court's observations respecting the MDA are not controlling in this case.

nominally harmonious state common-law standards, in order to avoid the conflict, uncertainty, cost, and potential misinformation that would inevitably result from simultaneous federal and state labeling prescriptions. See *Geier*, 529 U.S. at 871.[14]

D. Petitioners Did Not Seek This Court's Review Of The Court of Appeals' Determination That Their State-Law Claims Would Subject Respondent To Inconsistent Labeling Requirements

Petitioners urged in their petition for a writ of certiorari that the Court should grant review to clarify the legal standard for FIFRA preemption. See Pet. 3. They cited uncertainty over whether FIFRA "preempts state law tort claims," *ibid.*, and if so, whether FIFRA preempts "crop injury claims," Pet. 5-6. More generally, petitioners asserted a need to determine "the proper analysis to apply in determining which tort claims are preempted," Pet. at 19, and they identified five different potential tests, Pet. at 19-25. But petitioners specifically did not challenge the court of appeals' ruling that petitioners' claims are "label-related" in the sense that "a judgement against [respondent] would induce it to alter its product label." Pet. App. 15a. See Pet. 28-29. This Court accordingly should not entertain petitioners'

[14] Even if Section 136v(b) did not expressly preclude tort claims predicated on state common-law duties that are ostensibly "consistent with" FIFRA's misbranding prohibitions, such claims would be barred under principles of implied preemption, which are relevant even where Congress has provided an express preemption provision. See *Geier*, 529 U.S. at 869; *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287-288 (1995). In this case, a State's imposition of common-law duties that are nominally similar to FIFRA's misbranding prohibition would nevertheless result, as a practical matter, in subjecting pesticide manufacturers to inconsistent labeling obligations that would stand as an obstacle to Congress's manifest goal of imposing a uniform body of federal labeling requirements. The claims would therefore be barred as a matter of implied preemption. See *Hines* v. *Davidowitz*, 312 U.S. 132, 142-143 (1963).

challenge to whether those particular claims are "label-related" at this stage of the proceedings. See *Board of Commissioners* v. *Umbehr*, 518 U.S. 668, 677 n.* (1996).[15]

The United States pointed out, at the petition stage, that the petition did not challenge this aspect of the court of appeals' ruling:

> In this Court, petitioners do not take issue with the court of appeals' conclusion that the state law claims at issue here would impose [requirements for labeling] insofar as they would compel respondents to change the label they obtained through the FIFRA approval process. See Pet. 28-29 (noting, without disputing, the court of appeals' characterization of "each of the claims as label-related and as 'inducing' the manufacturer to change its label or product").

U.S. Amicus Curiae Br. on Pet. 12. Petitioners did not contest that point in their supplemental response to the government's brief. See Pet. Supp. Br. 1-3.

The United States assumes that the Court granted review, in accordance with petitioners' request, to address the general standards that govern FIFRA preemption, and not to undertake the case-specific task of evaluating whether the pleadings in this particular case assert claims that fall outside of the scope of FIFRA preemption. The Court's resolution of the issues that petitioners properly raised in their petition—whether FIFRA preempts state-law tort

[15] Petitioners' articulation of the "question presented" in their petition does not identify the issue. Petitioners phrased the question presented as: "Which, if any, state law crop injury claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-137." Pet. i. That question presents a challenge to the court of appeals' determination that petitioners' claims are "label-related" only in the sense that it presents a challenge to every aspect of the court of appeals' decision. Significantly, the body of the petition identifies the court of appeals' ruling on label-relatedness without calling it into question. Pet. 28-29.

claims that would impose labeling requirements and, if so, whether it nevertheless exempts product efficacy claims—would provide significant guidance for the lower courts. The Court should be reluctant to go further and resolve additional contentions that the specific claims at issue here "rest on legal duties that impose no alteration to an EPA-approved label." Pet. Br. 30; see *id.* at 40-50.[16]

[16] Petitioners suggest that the United States' amicus curiae brief in *Geye* supports their fact-bound challenges to the lower courts' determinations that their state-law claims are label-based. They read far too much into that brief. According to petitioners, "the U.S. acknowledges that strict liability claims should survive" (Pet. Br. 41), but the *Geye* brief in fact notes only that strict liability claims "need not" be label-based. U.S. Amicus Curiae Br. at 13, *American Cyanamid Co.* v. *Geye*, *supra* (No. 02-367). The brief does not state that Section 136v(b) would allow a strict liability claim in situations in which the claim "is functionally a disguised claim for failure to warn," as the court of appeals found in this case (Pet. App. 19a). See *Netland*, 284 F.3d at 899-901. Similarly, petitioners are mistaken in suggesting (Pet. Br. 45 n.32) that the United States endorsed their argument that Section 136v(b) "does not preempt" claims "stem[ming] from off-label statements." The passage from the United States' brief in *Geye* on which petitioners rely (U.S. Amicus Curiae Br. at 11-12, *American Cyanamid Co.* v. *Geye*, *supra* (No. 02-367) addressed alleged off-label statements that "substantially differed from" the relevant label. See *id.* at 6. By contrast, both courts below concluded that the alleged off-label statements at issue here did not "differ[] or stray[] in any material manner from the contents of the Strongarm label." Pet. App. 16a-17a; see *id.* at 25a.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Relevant Provisions of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136 *et seq.*

7 U.S.C. 136. Definitions

* * * * *

(p) Label and labeling

(1) Label

The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

(2) Labeling

The term "labeling" means all labels and all other written, printed, or graphic matter—

(A) accompanying the pesticide or device at any time; or

(B) to which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications of the Environmental Protection Agency, the United States Departments of Agriculture and Interior, the Department of Health and Human Services, State experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.

(q) Misbranded

(1) A pesticide is misbranded if—

(A) its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular;

* * * * *

(F) the labeling accompanying it does not contain directions for use which are necessary for effecting the purpose for which the product is intended and if complied with, together with any requirements imposed under section 136a(d) of this title, are adequate to protect health and the environment;

(G) the label does not contain a warning or caution statement which may be necessary and if complied with, together with any requirements imposed under section 136a(d) of this title, is adequate to protect health and the environment;

* * * * *

7 U.S.C. 136a. Registration of pesticides

(a) Requirement of registration

Except as provided by this subchapter, no person in any State may distribute or sell to any person any pesticide that is not registered under this subchapter. To the extent necessary to prevent unreasonable adverse effects on the environment, the Administrator may by regulation limit the distribution, sale, or use in any State of any pesticide that is not registered under this subchapter and that is not the subject of an experimental use permit under section 136c of this title or an emergency exemption under section 136p of this title.

* * * * *

(c) Procedure for registration

* * * * *

(5) Approval of registration

The Administrator shall register a pesticide if the Administrator determines that, when considered with

any restrictions imposed under subsection (d) of this section—

(A) its composition is such as to warrant the proposed claims for it;

(B) its labeling and other material required to be submitted comply with the requirements of this subchapter;

(C) it will perform its intended function without unreasonable adverse effects on the environment; and

(D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

The Administrator shall not make any lack of essentiality a criterion for denying registration of any pesticide. Where two pesticides meet the requirements of this paragraph, one should not be registered in preference to the other. In considering an application for the registration of a pesticide, the Administrator may waive data requirements pertaining to efficacy, in which event the Administrator may register the pesticide without determining that the pesticide's composition is such as to warrant proposed claims of efficacy. If a pesticide is found to be efficacious by any State under section 136v(c) of this title, a presumption is established that the Administrator shall waive data requirements pertaining to efficacy for use of the pesticide in such State.

* * * * *

7 U.S.C. 136j. Unlawful acts

(a) In general

(1) Except as provided by subsection (b) of this section, it shall be unlawful for any person in any State to distribute or sell to any person—

* * * * *

(E) any pesticide which is adulterated or misbranded; or

* * * * *

7 U.S.C. 136k. Stop sale, use, removal, and seizure

(a) Stop sale, etc., orders

Whenever any pesticide or device is found by the Administrator in any State and there is reason to believe on the basis of inspection or tests that such pesticide or device is in violation of any of the provisions of this subchapter, or that such pesticide or device has been or is intended to be distributed or sold in violation of any such provisions, or when the registration of the pesticide has been canceled by a final order or has been suspended, the Administrator may issue a written or printed "stop sale, use, or removal" order to any person who owns, controls, or has custody of such pesticide or device, and after receipt of such order no person shall sell, use, or remove the pesticide or device described in the order except in accordance with the provisions of the order.

* * * * *

7 U.S.C. 136*l*. Penalties

(a) Civil penalties

(1) In general

Any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of this subchapter may be assessed a civil penalty by the Administrator of not more than $5,000 for each offense.

* * * * *

(b) Criminal penalties

(1) In general

(A) Any registrant, applicant for a registration, or producer who knowingly violates any provision of this subchapter shall be fined not more than $50,000 or imprisoned for not more than 1 year, or both.

(B) Any commercial applicator of a restricted use pesticide, or any other person not described in subparagraph (A) who distributes or sells pesticides or devices, who knowingly violates any provision of this subchapter shall be fined not more than $25,000 or imprisoned for not more than 1 year, or both.

* * * * *

7 U.S.C. §136v. Authority of States

(a) In general

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Uniformity

Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

(c) Additional uses

(1) A State may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that State to meet special local needs in accord with the purposes of this subchapter and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator. Such registration shall be deemed registration under section 136a of this title for all purposes of this subchapter, but shall authorize distribution and use only within such State.

* * * * *